No. 87-1452

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THOMAS J. WISE, *et al.*,
Petitioners,

v.

ARLINGTON COUNTY, VIRGINIA, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a county's promotional decision pursuant to a narrowly-tailored remedial plan that is now moot and will never be repeated should be reviewed by this Court.

LIST OF PARTIES

The petitioners are Thomas J. Wise and Terence P. Murray. The respondents are Arlington County, Virginia; Anton S. Gardner; William K. Stover; and Alan V. Christenson. Mr. Gardner, the Arlington County Manager, was substituted for Larry J. Brown, who resigned the office of Arlington County Manager on April 15, 1987.

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STATEMENT

On April 26, 1983 seven black police officers employed by respondent Arlington County, Virginia ("County") filed employment discrimination charges against the County with the Equal Employment Opportunity Commission ("EEOC" or "Commission"). These charges raised claims that the County had engaged in discriminatory employment practices, including the use of biased or subjective promotion procedures, denial of training opportunities and career-enhancing work assignments, and disparate discipline and reinstatement practices.

At the time these charges were filed, there was only one black supervisor among the 60 police officers holding the management positions of corporal, sergeant, lieutenant, deputy chief and chief. All other supervisors were white. Therefore, over 98 percent of the supervisory ranks were white.

On July 17, 1984, the EEOC issued a determination that there was reasonable cause to believe that the County had discriminated against blacks in a number of employment practices. The EEOC found that the County's recruitment and hiring procedures and use of a pre-promotion test operated to exclude blacks as a class from the management ranks of the police department. In the Commission's view, all black police officers who took, or could have taken, the County's 1980 and 1982 corporal examinations had been discriminated against, because the examinations had not been validated properly and had an adverse impact on blacks, so that no black scored high enough to be eligible for consideration for promotion. The Commission also found that the County had discriminated in its training and reinstatement practices.

Based on these findings, the EEOC proposed a conciliation agreement that required the County to grant retroactive promotion to all seven charging parties, with full back pay and interest. Both the seven black officers and the County rejected this conciliation proposal. The County then proposed a settlement agreement that the EEOC rejected. After the EEOC rejected this settlement offer, the County entered into a settlement agreement ("Settlement Agreement") with the seven black officers. This litigation challenges the County's implementation of two provisions of the Settlement Agreement, even though the provisions were used only once to allow one preferential promotion and will not be used again, the Settlement Agreement having expired by its own terms.

An explanation of the County's promotional procedure helps to understand the virtually insignificant impact of the Settlement Agreement on that procedure. Under the traditional procedure, the pool of qualified officers eligible for promotional consideration consists of the greater of the top five candidates or top 20 percent of officers who pass the examination. Their names are placed on a "certified list" given to the selecting official (here, the police chief), based on rank order on the examination. This rank order does not reflect an assessment of overall qualifications, but is merely an orderly way of presenting the qualified candidates for the police chief's selection. The County does not follow a "best qualified" or rank-order system requiring selection of the highest-ranked candidate. Instead, the police chief is authorized to consider, among other

factors, a candidate's leadership ability, maturity, job performance, job history and integrity and in light of these factors can select anyone whose name is on the certified list. Thus, each candidate has no vested right to be promoted in a particular order, or promoted at all, but only an expectation to be considered for promotion in light of rank on the examination and these other important factors.

The Settlement Agreement varied this rule only slightly, and only in very limited circumstances. The first challenged provision of the agreement provided for the promotion of two incumbent qualified blacks to the position of corporal. The two promotions were conditioned on successful completion of a rigorous training and examination process and demonstration of supervisory and other skills throughout their tenure with the County.[1]

The decision to promote two blacks was based on and closely tied to the available qualified labor market and the anticipated number of vacancies. Since six promotions were made from 1982 to 1984 using the 1982 examination rankings, it was reasonable to assume, based on the relevant labor market, that at least two of those six promotions would have been of black officers under a properly validated examination process. The County and the seven officers agreed that it was not reasonable or practicable to grant specific relief to each black officer who had been victimized by the 1982 promotional process, since the number of affected blacks was greater than the total number of corporal openings filled during the two-year period in which the 1982 examination rankings were used to fill corporal vacancies.

The second challenged provision of the Settlement Agreement established a temporary supplemental promotional rule to allow consideration, but not mandatory selection, of not more than three additional qualified blacks. If the certified list from the 1984 corporal

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[1] Although the Settlement Agreement called for promotion of two qualified blacks, as applied only one black received preferential consideration. The other selected black officer scored above Officer Wise and high enough to be put on and selected from the certified list by the County's traditional procedure. Thus, only one placement on the list is really at issue.

examination had fewer than three black candidates, it was to be expanded to include in total the three highest-ranking qualified blacks. No black officer was to be added to the list unless he passed the examination. In addition, inclusion on the list did not assure anyone's selection: everyone on the list merely had an expectation to be considered for promotion.

The goal under this system was to increase the number of blacks that could be considered for promotion until by voluntary selection the number of black officers in the police department was representative of the number in the available qualified labor force. The Settlement Agreement specifically provided that it did not require the County to hire, promote or otherwise select an unqualified employee for a position, or to select a less qualified applicant over a better qualified applicant simply because of race or color. Nor was the County required to promote an officer from the supplemental list, after the initial two promotions described above were made. If the eligible group included an adequate number of persons to reach the goals, the supplemental list never needed to be used.

The supplemental rule closely followed the usual practice because it did not displace anyone from the certified list, but merely increased the available pool by up to three candidates. Of greater significance, this supplemental rule was used only once to make one promotion of a qualified black, ranked 33, to the position of corporal. Because the number of black corporals now reflects the percentage of qualified blacks in the relevant labor market, this supplemental rule is extinguished. It will not be revived under the Settlement Agreement, because the agreement called for use of the rule to attain, not maintain, the desired result. Now that the result is achieved, the agreement has expired by its own terms.

Ninety-three persons took the County's 1984 corporal examination and 79 passed. Petitioner Thomas Wise, a white County police officer ("Wise"), passed the examination with a rank of 22. This rank did not put him among the top 20 percent of candidates, and therefore his name was not on the first five certified lists given to the police chief for his first five corporal selections.[2] On June 20,

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[2]A new certified list is prepared to fill each vacancy. Thus, individual certified lists were prepared for each of these five vacancies.

1985, two vacancies occurred and Wise's rank was high enough to put him on the certified list prepared to fill the second vacancy of that day. Had the officer ranked 33 not been placed on the first certified list, Wise still would not have been listed until the certified list prepared to fill the first June 20, 1985 vacancy. Therefore, the Settlement Agreement did not delay Wise's consideration for promotion.

Petitioner Terence P. Murray ("Murray"), another white County police officer, also took and passed the 1984 corporal promotional examination. He ranked second on the first three certified lists prepared from the 1984 examination, and first on the later certified lists. Despite his high rank, several incidents of grossly unacceptable behavior indicated that he lacked the leadership and other qualities necessary for promotion to corporal (Murray App. pp. 96, 98-99[3]).

Both officers filed lawsuits against the County, its county manager, police chief and personnel director (collectively, "County") challenging the Settlement Agreement. Summary judgment was granted to the County in both cases, and upheld by an equally divided court of appeals. In 1986 the County administered its biennial corporal examination providing the current basis for rank order on certified lists. Wise did not take this examination and is no longer eligible for promotion. Murray took the examination and is on the certified list and eligible for consideration.

The police chief has promoted 19 persons to corporal based on the 1984 and 1986 corporal examinations. Only one of the 19 promotions was made pursuant to the terms of the Settlement Agreement. The current number of black corporals, four, reflects the number of qualified blacks in the available labor market.

Even after the promotion of several black corporals, approximately 90 percent of the supervisory positions in the Arlington County Police Department are held by white police officers.

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[3]"Murray App." refers to the Murray Joint Appendix filed in the court of appeals. "Wise App." refers to the Wise Joint Appendix filed in the court of appeals.

ARGUMENT

I. THE PETITION SHOULD BE DENIED ON MOOTNESS AND STANDING GROUNDS.

The petition should be denied on grounds of mootness. As respondents' counsel stated at *en banc* oral argument without opposition or rebuttal, the County no longer follows the temporary certification rule, because the provisions of the Settlement Agreement have been fully satisfied and have expired by their own terms. Therefore, there is no actual case or controversy at this stage and the Court lacks jurisdiction to review the matter under Article III of the Constitution. *DeFunis v. Odegaard*, 416 U.S. 312 (1974).[4]

Nor is a claim of mootness defeated by the petitioners' claim for promotion in the place of the black officers and back pay. Although this Court has ruled that a "viable" claim of back pay can preclude a showing of mootness, *Powell v. McCormack*, 395 U.S. 486, 499-500 (1969), in this case there is no "viable" claim of back pay. Wise and Murray cannot allege entitlement to money damages, since they had no tangible right to be promoted but only a right, fully observed by the County, to be considered for promotion. This case is not like *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 569-571 (1984), where mootness could not be found because the unlawful injunction might be complied with in future layoffs, and because displaced employees had claims for determinable back pay measured by the wages of positions they had once held.

Instead, the petitioners' case is similar to *County of Los Angeles v. Davis*, 440 U.S. 625, 631-633 (1979) and is moot because, as in that case, two things can be said with assurance. There is no reasonable expectation that the alleged violation will recur. The Settlement Agreement goal of a work force of a particular description has been met. In addition, a critical interim event — expiration of the temporary certification rule — has eradicated the effects of the alleged violation. *See also SEC v. Medical Committee for Human Rights*, 404 U.S. 403 (1972). The Court has no basis, other than

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[4]The case is moot as against Wise for the additional reason that he did not take the 1986 corporal examination and therefore is no longer eligible for promotion.

impermissible speculative contingencies, to pass on the substantive issues the petitioners ask it to review. *Board of License Commissioners of Town of Tiverton v. Pastore*, 469 U.S. 238, 239-240 (1985); *Hall v. Beals*, 396 U.S. 45, 49 (1969). Thus, the claims are moot and the petition should be denied or, in the alternative, it should be dismissed and the order of the court of appeals vacated with instructions that the matter be remanded to the district court to be dismissed.

The petition should also be denied on standing grounds. Wise and Murray lack standing because their alleged injuries — failure to be promoted — are not fairly traceable to implementation of the Settlement Agreement and are thus not likely to be redressed by this Court's review.

Perhaps the petitioners might be able to establish standing if they could show their eligibility for promotional consideration was delayed by the Settlement Agreement. But Wise and Murray suffered no delay in being certified, despite certification and selection of the black officer ranked 33.

Murray's name was on all certified lists, and thus he has been eligible for promotion from the earliest possible time. Wise's name also appeared on the certified list at the earliest possible time. He was not eligible for consideration until June 20, 1985, when two vacancies occurred and he was certified on the second list compiled that day. In the absence of the Settlement Agreement he would have been certified to fill the first vacancy occurring that day. Thus, his promotional consideration was not delayed a single day by operation of the agreement.

The petitioners lack standing for the additional reason that they had no entitlement to promotion under the County's traditional promotional system. The record is uncontroverted — indeed, petitioners' counsel conceded in the district court (Wise App. p. 280) — that it is a matter of conjecture, at best, whether Officer Wise would have been promoted in the absence of the Settlement Agreement. The same conclusion can be made in Officer Murray's case, given his record and the fact that the County considers factors of leadership ability, integrity and maturity in making promotions (Murray App. pp. 96, 98-99). Thus, the failure to promote Wise and Murray has not caused either a distinct or palpable injury, as required by

Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979), but rather at most an abstract, conjectural or hypothetical one that is not judicially cognizable. *Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983). There is nothing in the record to suggest either petitioner would have been promoted if the black officer ranked 33 had not been certified and selected, and there is no basis for such suggestion. Under the County's promotional system, placement on the certified list is a prerequisite to consideration for promotion, but does not assure promotion. Rank order does not dictate when a candidate will be selected. Thus, the alleged injuries are too attenuated and, most importantly, the prospect of obtaining relief from the injuries as a result of a favorable ruling, too speculative to support jurisdiction. *Allen v. Wright*, 468 U.S. 737, 752 (1984); *see also Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975); *Linda R. S. v. Richard D.*, 410 U.S. 614 (1973).

II. PRUDENTIAL CONCERNS COMPEL DENIAL OF THE PETITION.

Several prudential concerns virtually compel denial of the petition for a writ of certiorari. For example, there are no published opinions from the district court cases or from the consolidated *en banc* disposition of the claims. Thus, the only parties affected by any decisions in the case are the two petitioners and the County. No other parties are bound by the courts' rulings, and no precedent has been set by the courts. In such a case it seems unwarranted to allocate the "scarce judicial resources" expended in grant of certiorari, *Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985), to review a case of such narrow import.

Furthermore, this case does not involve an important question of federal law which has not been, but should be, settled by this Court. As discussed in the next section of the argument, the Court has settled these issues in a manner consistent with the decisions below. *United States v. Paradise*, 107 S. Ct. 1053 (1987); *Johnson v. Transportation Agency*, 107 S. Ct. 1442 (1987). Nor does the case raise an issue about which the courts of appeals are in conflict.

Instead, the circuit courts recognize that it is settled law that very limited, properly tailored affirmative action can be taken to redress the lingering effects of past discrimination or to integrate the ranks of public safety departments. *See, e.g., Youngblood v. Dalzell*, 804 F.2d 360 (6th Cir. 1986), *cert. denied sub nom. Cincinatti Firefighters Union, Local Union No. 48 v. Youngblood*, 107 S. Ct. 1576 (1987); *Deveraux v. Geary*, 765 F.2d 268 (1st Cir. 1985), *cert. denied*, 106 S. Ct. 3337 (1986); *Bushey v. New York State Civil Service Commission*, 733 F.2d 220 (2d Cir. 1984), *cert. denied*, 469 U.S. 1117 (1985); *Warsocki v. City of Omaha*, 726 F.2d 1358 (8th Cir. 1984); *Talbert v. City of Richmond*, 648 F.2d 925 (4th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982).

Certiorari also is misplaced in a case like this where the question of law is simple but the facts are complex. Although material facts are not in dispute, there is a substantial record in each of the cases which must be culled to make the review sought by the petitioners. The pleadings, affidavits, agreements and other documents must be sifted and studied to allow an adequate understanding of the facts — activities that are avowedly not the function of this Court on certiorari review. The Court has made plain it does not "grant a certiorari to review evidence and discuss specific facts," *United States v. Johnston*, 268 U.S. 220, 227 (1925); and as a "court of law, rather than a court for correction of errors in fact finding," the Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949), and cases cited. No obvious or exceptional error was made in this case. Furthermore, review of the fact-findings below is made more difficult because there are no written, much less published, opinions. All of these reasons argue strongly against granting certiorari review.

III. BOTH *PARADISE* AND *JOHNSON* UNCONTESTABLY PERMIT THE COUNTY'S ACTION.

Although the petitioners contend that this case presents "questions of substantial and recurring importance" (Pet. p. 10[5]), and issues that "fall squarely between this Court's recent rulings" (Pet. p. 11), the petition for a writ of certiorari should be denied because this Court's most recent decisions are controlling, dispose of all the issues raised, and fully support the decisions of the courts below.

In its most recent employment discrimination cases, this Court has unequivocally upheld affirmative action far more sweeping than that challenged here. Thus, the Court has clearly indicated that the action challenged here cannot offend the Constitution, particularly when that action is nothing more than one-time use of a temporary certification rule to allow promotion of one qualified black police officer. For example, in *United States v. Paradise*, 107 S. Ct. 1053 (1987) and *Johnson v. Transportation Agency*, 107 S. Ct. 1442 (1987), the Court reaffirmed a public employer's ability to make race or sex-conscious selections when the proper basis is shown. In *Paradise*, a judicial finding of discrimination supported the remedy, but the Court was careful to note that something less than that would suffice. In *Johnson*, the Court made plain that a judicial finding of discrimination was not required for a government agency to engage in preferential hiring, and that significant statistical imbalance, as in this case, justifies affirmative action.

The Settlement Agreement contains two contested provisions. The first, resulting in one-time promotion of a qualified black meeting training and examination requirements, presents a fact pattern similar to *Paradise*. That case controls disposition of this claim, and undoubtedly permits the selection. The second challenged provision of the Settlement Agreement, establishing a temporary supplemental rule, is tied in scope and duration to the need to correct a severe statistical imbalance of blacks in the supervisory ranks of the police department, and in this respect is remarkably similar to the

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[5] "Pet." refers to the petition for a writ of certiorari filed in this case.

remedy upheld in the *Johnson* case.[6] *Johnson* clearly allows the challenged use of the temporary rule.

This Court's decisions in these and other cases leave no doubt that the rulings below are correct and the petition for a writ of certiorari should be denied. For example, like the *Paradise* district court, the County took properly limited remedial steps based not only on statistical evidence of an egregious situation implying discrimination, but also on a sweeping finding of discrimination made by the EEOC. In addition to severe statistical imbalance, the EEOC found that the County's promotional process for the entry level supervisory rank of corporal operated to exclude blacks as a class; that discriminatory practices were followed in assignments and training; and that blacks were treated unfairly when reinstated. Given this evidence, the County could take race into account, provided it did so in the narrowest way possible. The Settlement Agreement was properly limited, for it allowed the single promotion of a qualified black officer by the one-time use of a supplemental certification rule. The high number of qualified blacks in the relevant labor market and the number of corporal vacancies indicate that this single promotion was closely tied to correcting the perceived discrimination and no more.

The *Johnson* case also supports the County's implementation of the Settlement Agreement. The petitioners contend that the terms of the Settlement Agreement go beyond the relief allowed by *Johnson*, because unlike the method in that case, the Settlement Agreement displaced otherwise eligible candidates. The petitioners' contention is wrong. By its terms, and as applied, the Settlement Agreement did not prohibit consideration of anyone eligible for promotion under the County's ordinary, top 20 percent rule. The challenged provision of the Settlement Agreement merely expanded by not more than three candidates the number of persons given to the police chief for that consideration.

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[6]Although *Johnson* is a Title VII case, its pronouncements are instructive in cases raising similar issues under the Equal Protection Clause, as the courts of appeals have acknowledged. *See, e.g., J.A. Croson Co. v. City of Richmond*, 822 F.2d 1355, *prob. juris. noted*, No. 87-998 (Feb. 22, 1988).

Furthermore, as in *Johnson*, the County's data showing underrepresentation and thus supporting the remedy was properly refined. There were no blacks in the rank of police corporal, despite a substantial number of blacks in the police department at the rank just below corporal, and a great number of blacks meeting the requirements for the job in the Washington, D.C. standard metropolitan statistical area.

Application of the temporary supplemental rule is also consistent with the concern expressed in *Paradise* and *Johnson* that "legitimate firmly rooted expectation" not be disturbed. *Johnson*, 107 S. Ct. at 1455-1456. No one was excluded from consideration by operation of the rule: all were able to have their qualifications assessed. Race was only a factor to the extent that it allowed consideration of a very small number of additional candidates. In addition, neither petitioner was entitled to the first or any other police corporal positions after the 1984 examination. They were classified as qualified and eligible, but the police chief was authorized to promote anyone on the certified list. Therefore, the decision not to promote Wise and Murray upset no properly held expectations they had. In addition, they lost no rank or salary as a result of application of the rule. They kept their jobs, at the same salary, seniority and degree of eligibility for promotion.

The County's plan is also similar to the Transportation Agency's for it was intended to attain a balanced work force, not to maintain one. Furthermore, the temporary nature of the rule is irrefutably shown by the fact that the rule has been discontinued and was used only once to consider promotion of a single officer outside the top 20 percent of candidates.

Finally, both *Paradise* and *Johnson* tell us that the County could permissibly promote a qualified black ranking lower on the certified list than Wise or Murray, based on severe underrepresentation of blacks in the job category and other record evidence of discrimination. Therefore, the petitioners raise no questions on which this Court has not clearly explained the law and the petition for a writ of certiorari should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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